Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-115
Telecommunications Act of 1996:	)	
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other Customer	)	
Information	)	
	)	
Implementation of the Non-Accounting	)	
Safeguards of Sections 271 and 272 of the	)	CC Docket No. 96-149
Communications Act of 1934, as Amended	)	

PETITION FOR RECONSIDERATION

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SUMMARY OF ARGUMENT

CMRS providers occupy a unique segment of the telecommunications marketplace. From the initial inception of commercial cellular service with two licensees in every market, CMRS providers have always faced competition. Congress and the Commission have responded to the different realities faced by CMRS providers and, especially since the 1993 Budget Act, have increasingly deregulated the CMRS industry. Now, however, in implementing Section 222, the Commission failed to recognize that uniform rules are unsuitable for carriers operating in markets that have vastly different attributes. Instead of adapting its CPNI rules for the competitive CMRS marketplace, the Commission has inexplicably imposed the same CPNI requirements on CMRS providers that it imposes on incumbent LECs.

CMRS providers always have had competitive reasons to respect their customers' privacy concerns. They have never been subject to broad, formal CPNI restrictions. While Comcast is not opposed to reasonable protections for CPNI, Comcast urges the Commission to reevaluate the appropriateness of its CPNI rules as applied to CMRS providers. Congress' aim in enacting Section 222 was to protect customers' reasonable expectations of privacy. It follows, therefore, that customer expectations for different industry segments should have been considered.

In the CMRS industry, for example, it is common practice to market CPE with CMRS service. Customers expect their CMRS carriers to offer them new CPE-service packages as technology changes. By using CPNI to target customers that will benefit from new integrated packages, CMRS carriers reduce their customers' costs, thus improving customer retention and growing the CMRS market as a whole. The Commission's CPNI rules, however, unduly constrain a CMRS carrier from using CPNI to determine which customers might benefit from a

new combination of CMRS service and CPE. The Bureau's last minute clarification of the rules has not solved this problem. No valid rationale is given for imposing a rule that defies common customer expectations.

Similarly, CMRS providers have always maintained marketing programs to retain and regain customers. While the rules apparently allow carriers to use CPNI to keep their customers, the rules, inexplicably, prevent carriers from attempting to win their customers back. Again, such a rule is contrary to common CMRS industry practice and customer expectations. Customers expect their CMRS providers to aggressively pursue their business, and they expect their carriers to offer them service packages tailored to suit their needs. Now, however, the Commission would forbid CMRS providers from following established business practices.

Nothing in Section 222 limits the Commission's ability to tailor its CPNI rules to different industry segments. Indeed, in other rulemakings to implement sections of the 1996 Act, the Commission has recognized its obligation to vary the scope and impact of regulation based on different market characteristics and rejected any notion that it should merely codify statutory provisions in its rules. Here the Commission has needlessly imposed uniform regulation in a manner that is contrary to the public interest. On reconsideration, the Commission should conduct a market specific analysis and recognize how CMRS providers differ both from incumbent LECs and from IXCs. Then, after conducting such an analysis, CPNI rules can be adopted that accommodate the differences between these markets. Specifically, for CMRS providers, the Commission should eliminate restrictions on the use of CPNI to market CPE and to win former customers back.

At the same time, on reconsideration, the Commission must revisit its "total service" approach. The total service approach is not the flexible, pro-consumer regulatory regime the

Commission supposes it to be. Rather, the total service approach creates unique competitive advantages for incumbent LECs operating in non-competitive markets. As Commissioner Ness pointed out in her partial dissent, Congress did not intend to allow the incumbent LEC affiliates to circumvent statutory structural separation requirements through shared use of CPNI. The Commission cannot permit the incumbent LECs to capitalize on local exchange CPNI in a total service relationship when that CPNI access evolved not because of customer free choice but because of monopoly advantage. Accordingly, the Commission should revisit and revise its CPNI rules to ensure they do not confer anticompetitive advantages on incumbent LECs.

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PETITION FOR RECONSIDERATION

Pursuant to Section 1.429(a) of the Federal Communication Commission's ("Commission") rules, Comcast Cellular Communications, Inc. ("Comcast") submits this Petition for Reconsideration of the Commission's *Order* in the above-captioned proceeding on carrier use of customer proprietary network information ("CPNI").[1/] The CPNI rules fail to recognize that uniform rules are unsuitable for carriers operating in markets that have vastly different attributes. As demonstrated by the many comments supporting deferral of CPNI rules for Commercial Mobile Radio Service ("CMRS") providers, CMRS providers operate in an intensely competitive environment. While CMRS providers have competitive reasons to respect their customers' privacy concerns, they have never been subject to broad, formal CPNI restrictions of the type the Commission has determined should apply to all telecommunications carriers.

1/ Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, *Second Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-115 (released February 26, 1998) ("*Order*").

The Commission's CPNI framework ignores the very different histories and characteristics of the local exchange, interexchange and CMRS markets. This failure to tailor CPNI restrictions to different industry segments will impair CMRS competition and make CMRS less likely to challenge the dominance of local landline carriers. Comcast urges the Commission to reconsider its *Order* as discussed below.

I. THE CMRS INDUSTRY NEEDS CPNI RULES THAT ACCOUNT FOR THE WAY CMRS IS PROVIDED

Comcast is a mid-sized regional facilities-based cellular carrier with markets covering more than 8.2 million potential customers in Pennsylvania, New Jersey and Delaware. With the arrival of PCS in the Philadelphia market, there are now **six** facilities-based CMRS providers vying for wireless customers. Comcast has no monopoly revenue base or nationwide market scope that might cushion the impact of all of the new regulatory costs and compliance obligations imposed on CMRS providers over the past few years.[2/]

The Commission's new CPNI rules place additional and unnecessary compliance burdens on competitive CMRS providers. These burdens translate into costs that ultimately must be recovered from CMRS customers. Comcast, along with many other CMRS providers, has already demonstrated the competitive dislocation and inefficiencies that will be caused by the imposition of the CPNI rules.[3/] The first and most important step in rectifying this situation is for the Commission to perform market specific analysis, examine how CMRS providers differ both

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2/ *See, e.g.*, Assessment and Collection of Regulatory Fees for Fiscal Year 1998, *Reply Comments of Comcast Cellular Communications, Inc.*, MD Docket No. 98-36 (filed May 4, 1998) at Appendix A (detailing four new fees that have been imposed recently on CMRS providers).

3/ *See* Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, *Reply Comments on Request for Deferral and Petition for Forbearance or Stay of Comcast Cellular Communications, Inc.*, CC Docket No. 96-115 (filed May 13, 1998) ("Comcast Reply"). Subsequent comments, reply comments and requests referred to hereafter are to this proceeding.

from incumbent LECs and from IXCs. Then CPNI rules can be tailored to accommodate the dynamics of these markets by permitting CMRS operators to continue to fulfill their customer's expectations without compromising customer privacy concerns.

A. CMRS Providers Are Historically, Legally and Factually Different From Other Telecommunications Services Providers

It was a mark of Commission ingenuity in the early 1980s that it dared to go against the grain and divide the available cellular spectrum into two allocations for two competing providers.[4] Comcast has always faced at least one direct competitor and with the advent of PCS and wide-area SMR, Comcast is now one of six wireless competitors operating in the Philadelphia market (with several of these competitors *national* in scope).

Because they have always operated in a competitive, rather than a monopoly, environment, CMRS providers quite naturally have developed business practices that are unlike those of incumbent LECs.[5] CMRS providers almost universally offer customers combined service packages including customer premises equipment ("CPE"), usually handsets or other accessories. Indeed, CMRS service cannot be delivered except on wireless handsets that are programmed to operate on a particular carrier's network, and some CPE cannot work on another carrier's network. The Commission has recognized the benefits to consumers of these CMRS

4/ *See* An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, *Report and Order*, 86 FCC 2d 469 (1981) at ¶ 15. The Bell System proposed cellular to be a Bell System-only monopoly service, which the Commission did not permit.

5/ Wireless services also are regulated differently and have entirely different characteristics from the interexchange market. For example, wireless service providers receive Commission licenses on the federal, rather than the state, level and often have licenses that cross state boundaries. Since 1993 these licenses have been awarded through government auction. Interexchange carriers, in contrast, do not pay for their authorizations and receive their primary authorizations from the individual states.

phone and service packages and has not required that CMRS wireless handsets interoperate among CMRS networks that deploy different technologies.[6]

CMRS carriers also have developed customer incentive and retention programs to reduce costly customer churn.[7] These customer satisfaction programs typically use CPNI and may involve an offer of deeply discounted or free CPE, such as offering analog cellular customers digital handsets if they convert to digital CMRS service. CMRS providers have also, like any business in a competitive industry, used the information they have about their customers' network usage to attempt to market additional services as they develop and to win those customers back if they switch to another CMRS provider. These CMRS marketing practices that clearly benefit the public, however, are in jeopardy because of the imposition of rules suited for incumbent LECs on the competitive CMRS industry.[8]

6/ In contrast, the Commission took strong regulatory action in the 1960s and 1970s to remove unreasonable restrictions on customer use of CPE made possible by the Bell System monopoly, thus creating an equipment registration regime that formed the basis for a competitive and deregulated landline CPE market.

7/ ILECs have historically not needed to be concerned about knowing who their customers are and how to best serve them because a customer had no choice but to use the ILEC's services.

8/ *See, e.g.*, AirTouch Comments at 1-2. As AirTouch points out, it was not concerned about the CPNI obligations imposed on CMRS providers under Section 222 because it believed these obligations could be implemented in a reasonable manner without disruption of existing CMRS industry practices. *Id.* at 3. Comcast also focused its comments and reply comments in the CMRS Safeguards proceeding (which CPNI aspects were rolled into the present proceeding for resolution) on distinguishing the burdens to be imposed upon ILECs and their wireless affiliates. *See* Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, *Comments and Reply Comments of Comcast Cellular Communications, Inc.*, WT Docket No. 96-162 (filed October 3, 1996 and October 24, 1996). Comcast could not possibly have imagined that the Commission would seek, in establishing effective safeguards on ILEC use of CPNI, to "level down" the CMRS industry by establishing one size fits all CPNI rules. As CMRS is a competitive industry, and the overarching purpose of the 1996 Act was to foster competition and to "deregulate" the telecommunications industry, there was little reason to believe that the Commission would adopt a policy to treat all carriers the same and in that to apply uniformly an ILEC regulatory framework.

No public policy reason supports treating competitive CMRS carriers the same as incumbent LECs in their use of CPNI. Congress recognized that CMRS was unlike the landline local exchange or the interexchange market when it created CMRS in 1993.[9] It was plain then that CMRS was a competitive force that could, if properly encouraged, challenge the landline local exchange monopolies. Indeed, Congress recognized that mobile radio services did not respect state borders and Congress preempted most aspects of state common carrier regulation for CMRS.[10] The Commission exercised the authority Congress gave to it to forbear from applying numerous federal common carrier obligations to CMRS providers.[11] Thus, CMRS has been subject to its own particular regulatory framework since 1993, and the Telecommunications Act of 1996 continued this status.[12]

Both historically and as a matter of law and regulation, CMRS simply is different. Because of this, the Commission must analyze the effects of its new, uniform regulations on CMRS by squarely considering the characteristics of the CMRS market. Failure by the Commission to perform this critical analysis will inappropriately consign CMRS carriers to CPNI regulation suited for non-competitive segments of the telecommunications market.

9/ *See* Omnibus Budget Reconciliation Act of 1993, Pub.L.No. 103-66, 107 Stat. 312, 392 (1993).

10/ 47 U.S.C. § 332(c)(3).

11/ *See* Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411 (1994).

12/ Telecommunications Act of 1996, Pub.L.No. 104-104, 110 Stat. 56 (1996) ("1996 Act"). In fact, the 1996 Act continued to distinguish between CMRS and local exchange carriers by classifying CMRS providers as telecommunications carriers rather than as LECs.

B. Nothing in Section 222 Requires the Commission to Ignore the Dynamics of the CMRS Market

The Commission determined that because Section 222 used the term "telecommunications carrier" to describe the range of carriers subject to legal requirements to safeguard customer CPNI, the Commission lacked discretion to vary the level of CPNI regulation based on differences in carriers' markets.[13] The Commission concluded that because Section 222 is framed as a general obligation on all telecommunications carriers, Congress must have meant that uniform regulations should be imposed. Such a conclusion is not based on any express direction in Section 222 or elsewhere in the 1996 Act and is contrary to the Commission's prior actions in implementing the 1996 Act.

In fact, the Commission has used its discretion as the expert agency charged with implementing the 1996 Act to modify regulatory treatment of different types of telecommunications carriers when such an action would promote the public interest. Section 254(k), like Section 222, is framed to apply to "telecommunications carriers" generally. When the Commission codified the Section 254(k) prohibition on cross-subsidy in its rules, the agency cited the lack of market power of nondominant carriers and determined that it was necessary only to implement Section 254(k) with respect to incumbent LECs that maintained the incentive and ability to cross-subsidize.[14] The Commission's implementation of the 1996 Act provides

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13/ *Order* at ¶ 49. While the Commission in fact expressed some sympathy for the notion that CMRS was different, it concluded, without any analysis, that its hands were tied.

14/ Implementation of Section 254(k) of the Communications Act of 1934, as Amended, *Order*, 12 FCC Rcd 6415, 6421 (1997).

additional examples of the Commission's use of its discretion to treat carriers (even within the same regulatory category) differently based upon differing circumstances.[15]

This does not mean that CMRS providers should be exempt from CPNI protection obligations. Rather, these examples illustrate that the Commission has, in other contexts, understood that one of its essential missions is to bring its judgment to bear and to vary the scope and impact of regulation based on different market characteristics. The Commission should not assume a mere ministerial role in implementing Section 222. Because it is plain that the Commission is not compelled by law to apply the same CPNI restrictions to CMRS carriers that it applies to incumbent LECs, Comcast urges the Commission to reconsider their application to CMRS providers. The Commission is fully empowered to regulate CPNI use of differently situated classes of carriers differently within the "all carrier" framework of Section 222 and it would be a mistake to conclude otherwise.

The Bureau's *Clarification Order*, released just two business days before the CPNI rules take effect, does not significantly alleviate the burden the CPNI rules place on CMRS providers.[16] Under the *Clarification Order* the Bureau states that if a customer purchased CPE from a carrier, a carrier can bundle CPE with service packages for that customer. Carriers may not, however, make use of CPNI to offer bundled CPE packages to a customer who did not purchase CPE as part of a bundled offering from the carrier that currently provides him or her

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15/ For example, the Commission created two tracks when reforming its universal service high-cost fund, one for rural and another for non-rural LECs. Federal-State Joint Board on Universal Service, *Report and Order*, CC Docket No. 96-45 (released May 8, 1997) at ¶¶ 232-256. As a result, two carriers within the same service category will be regulated differently based upon their differing circumstances.

16/ *See* Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, *Order*, CC Docket No. 96-115 (released May 21, 1998) ("*Clarification Order*").

service.[17] As a practical matter this "clarification" is unworkable and only serves to exacerbate the problems posed by the CPNI-CPE restriction because carriers have not preserved records of which customers have purchased CPE as part of a bundled or special offer. Further, as the CMRS industry has made abundantly clear, customer "churn" is a significant fact of life in the highly competitive CMRS industry. Many customers who change carriers already own CPE. These customers will become second-class citizens because carriers cannot offer them the same attractive CPE or information service packages offered to other customers with similar usage patterns. Indeed, the *Clarification Order* appears to be an attempt to deal with some of the concerns raised by CMRS carriers. Unfortunately, the attempt will fail because it is a rule of general application rather than a CMRS-specific solution.[18]

II. THE COMMISSION'S INTERPRETATION OF SECTION 222's APPLICATION TO CMRS NEEDLESSLY CONSTRAINS CUSTOMER CHOICE

The Commission must not disregard the serious impact of its decision to treat IXC, ILEC and CMRS carriers alike. Such a regime imposes significant new restrictions on CMRS providers. CMRS providers have always protected sensitive customer information, but have never had to operate under the type of restrictions the Commission has adopted here. Compliance with the current CPNI rules will cause enormous dislocations for CMRS carriers and customers alike.[19]

17/ *Clarification Order* at ¶¶ 5-6. Oddly, in an attempt to relieve a regulatory burden, the Bureau has created a new, even harsher burden. Going forward, CMRS carriers will have to keep records of where their customer's phones come from.

18/ The impact of this clarification in the ILEC context would appear to permit GTE to survey its customers to determine which have purchased GTE landline phones, thus permitting GTE a future bundling opportunity. This would be an entirely unnecessary result if the Commission would simply adopt an appropriate service specific distinction.

19/ *See, e.g.*, CTIA Request at 15-28.

The *Order* acknowledges that Congress' aims in enacting Section 222(c) was to protect customers' reasonable expectations of privacy regarding sensitive information by giving them control over CPNI use, both by their current carrier and by third parties."[20] The *Order* specifically describes Congress' intent in enacting Section 222, in part, as follows:

> [we agree] with commenters that Congress recognized through Sections 222(c)(1)(A) and (B) that customers expect that carriers with which they maintain an established relationship will use information derived through the course of that relationship to improve the customer's existing service. Accordingly, as many commenters observe, what the customer expects or understands is included in its telecommunications service represents the scope and limit of its implied approval under Section 222(c)(1)(A) . . . *customers do not expect that carriers will need their approval to use CPNI for offerings within the existing total service to which they subscribe.*[21]

Conformance with these principles mandates that the Commission first analyze the scope of the CMRS customer-carrier relationship and second, determine for CMRS what "services [are] necessary to or used in such [ ] service".[22]

A. Implementation of Section 222 for CMRS Should Focus on Customers' Expectations

If the Commission was unaware previously, CMRS commenters on the CTIA/GTE deferral/forbearance petitions demonstrated that CPE and information services traditionally have been marketed in integrated packages with CMRS service. CMRS customers, therefore, fully expect that CPNI derived from CMRS use will be used for marketing related CPE and information services. Because these integrated packages reduce customer costs, customers benefit from this use of CMRS CPNI. The failure of the Commission's rules to enable CMRS

20/ *Order* at ¶ 53.

21/ *Id.* at ¶ 54 (footnotes omitted).

22/ Section 222(c)(1)(B) allows carriers to use CPNI without approval in their provision of "services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories."

carriers to meet these customer expectations eviscerates Congress' intent in enacting the Section 222 CPNI protections.[23]

B. The Commission's Current Interpretation of Section 222 Discriminates Against CMRS Carriers

The Commission permitted sharing of CPNI among all affiliates that provide telecommunications services to a customer as a part of a "total service" relationship.[24] This approach favors large, diversified, incumbent LECs, who already enjoy the distinct advantage of using CPNI gained through their monopoly status.

For example, the CPNI rules as clarified would restrict a CMRS carrier from using CPNI to determine which customers might benefit from new combinations of CMRS service, CPE and information services depending upon how the customer first purchased his or her CPE and information services. Yet, these same rules would seem to **permit** an ILEC to use CPNI without customer consent to track use of local exchange and intraLATA toll services, to seek to retain intraLATA toll customers through customer incentive plans, or to undertake other customer segmentation promotions. Under the rules, an ILEC also could identify customers who appear to have long call holding times and use this information to market its ISDN services, or its DSL solution that involves signing up with an ILEC ISP affiliate, or use this information to market a second telephone line. If the ILEC local service customer is also a customer of an ILEC CMRS affiliate, the cellular CPNI also would be mined for this same type of information.[25]

23/ Indeed, the Commission in the *Order* recognizes the delicate balancing of interests Congress engaged in when enacting Section 222. *Order* at ¶ 26.

24/ The Commission did not, however, include within the scope of "services" either CPE or information services, even when these services are already subscribed to by a CMRS customer.

25/ While the *Order* provides that the Commission will exercise its authority to prevent discrimination by incumbent LECs who attempt to use CPNI anticompetitively (such as identifying

(continued...)

The Commission has recognized that the use of data, including customer information, is critical to the competitive development of communications markets.[26] In this instance, it seems incongruous that ILECs, who have exclusive and universal access to CPNI only because they are a monopoly incumbent, are simply handed the tools to further entrench their monopolies, while at the same time competitive service providers are deprived of use of information critical to compete.[27] On reconsideration, the Commission should display the same awareness of these competitive issues that it has in dealing with other aspects of implementation of the 1996 Act, such as its *Local Competition Order*.[28]

25/ (...continued)
customers to target for new non-telecommunications services based on the volume of telecommunications services used, *e.g.*, marketing its on-line services to all residential customers with a second line), it also provides that if customers subscribe to local, long distance and CMRS from the same carrier this would effectively result in the broad sharing of CPNI within the corporate enterprise as advocated by the BOCs and GTE. *Order* at ¶ 58 n.218 and ¶ 59.

26/ *See, e.g.*, Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, *Memorandum Opinion and Order*, CC Docket No. 97-137 (released August 19, 1997) at ¶¶ 129-130 ("In order to compete in the local exchange market, new entrants must . . . have access to the functions performed by the systems, databases and personnel, commonly referred to collectively as operations support systems, that are used by the incumbent LEC to support telecommunications services and network elements. . . . Indeed, in the *Local Competition Order*, the Commission concluded that operations support systems and the information they contain are critical to the ability of competing carriers to use network elements and resale services to compete with incumbent LECs.") (internal citations omitted).

27/ The Commission has in the past employed a fresh look when a monopoly telecommunications market is opened to competition and ought to adopt a variant of that approach here. For example, the Commission adopted a fresh look policy for special access expanded interconnection which limited the contract termination charges an ILEC could impose on customers terminating long-term service arrangements. The Commission took this action to prevent these customers from missing the benefits of the new, more competitive access environment brought about by a change in the Commission's rules. *See* Expanded Interconnection with Local Telephone Company Facilities, *Report and Order*, 7 FCC Rcd 7369 (1992). In another example, the Commission allowed airlines to terminate, without penalty, their contracts with GTE Airfone when other carriers were authorized to provide competitive air-ground radio telephone service. *See* Allocation of the 849-851/894-896 MHz Bands, *Memorandum Opinion and Order*, 6 FCC Rcd 4582 (1991).

28/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd 15499 (1996).

C. The Commission Must Interpret Section 222(c)(1)(B) to Have Its Common Sense Meaning

Key to the Commission's rationale in permitting affiliate sharing of CPNI is the customer's expectation that any use made of his or her CPNI will be in the course of the total service customer-carrier relationship.[29] This rationale requires that the Commission expand its view of implied consent so that customer expectations consistently govern the scope of implied consent across *competitive* telecommunications markets. This implied consent to use of CPNI logically includes provision of "services necessary to, or used in the provision of, such telecommunications service, including the publishing of directories."[30] Clearly, CMRS service, CPE and information services fall within this framework.[31]

Critical to the *Order*'s conclusions to the contrary are two premises: (1) that CPE is equipment, not a "service"; and (2) that information services are not "necessary to or used in" the carrier's transmission of telecommunications services but rather are used by the customer independent of the telecommunications services provided.[32] These assumptions do not take into account technological and market driven differences between landline and CMRS services. CMRS CPE, specifically CMRS handsets, are necessary to the provision of CMRS service because they are technologically inseparable from CMRS transmission service. Similarly, the mobile nature of CMRS and issues unique to CMRS, such as preservation of battery life, make

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29/ *Order* at ¶ 55 ("Customers choosing an integrated product will expect their provider to have and use information regarding *all parts of the service* provided by that company, and will be confused and annoyed if that carrier does not and cannot provide complete customer service.").

30/ 47 U.S.C. § 222(c)(1)(B).

31/ Numerous commenters on the CTIA/GTE petitions supported this contention. *See, e.g.*, AT&T Comments at 6; BellSouth Comments at 9; Vanguard Comments at 4.

32/ *Order* at ¶¶ 71 and 72.

information services such as call answering, voicemail or messaging and voice storage and retrieval services necessary to and used in the provision of CMRS services. CMRS carriers will be impaired in their ability to compete with landline carriers, and consumers will be shortchanged, if they are unable to market these services with CMRS service using CPNI.

D. The Rules Are Both Internally Inconsistent and Inconsistent With the Statute

The *Order* fails to reconcile two seeming inconsistencies in the CPNI rules: (1) the interpretation of "necessary to" and "used in" excludes CMRS CPE but includes landline telephone inside wiring; and (2) Congress itself, in Section 222(c)(1)(B), lists as a service "necessary to or used in" the provision of telecommunications services the "publishing of directories."[33]

The installation and maintenance of inside wiring is equivalent to the CMRS handset programming that makes CMRS transmission possible. Just as inside wire maintenance and installation is a service, so also is this programming function. Thus, just as the inside wire is viewed as a part of landline service rather than as equipment that makes the service possible, so should the wireless handset. The *Order* does not adequately explain how the Commission could have arrived at a contrary conclusion.

Section 222(c)(1)(B)'s explicit inclusion of the publishing of directories as an example of a service "necessary to" or "used in" the provision of telecommunications services supports a broader reading of Section (c)(1)(B). While Comcast does not oppose the Commission's conclusion that inside wire is necessary for delivery of landline telephone service, it is difficult

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33/ 47 U.S.C. § 222(c)(1)(B).

to see how the Commission could have reached a contrary conclusion on the necessary status of CMRS handsets to the delivery of CMRS service.[34]

Absent an adequate justification, the Commission must reconsider these inconsistencies. The Commission has an obligation to address each argument presented and to present the factual or legal reasons for its conclusions. To do otherwise constitutes arbitrary and capricious decision making.[35]

E. The Commission's Narrow Reading of Section 222(c)(1)(B) Harms CMRS Customers

Another problem posed by the Commission's narrow reading of Section 222(c)(1)(B) "services" is that it deprives CMRS customers of what they have come to expect from CMRS carriers as a result of common industry practice fully endorsed by the Commission.[36] Indeed, the Commission's interpretation is contrary to Congress' stated intent in enacting Section 222 – to protect sensitive customer information consistent with customer expectations. CMRS customers, having neither the motivation nor the specialized knowledge to investigate services

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34/ Indeed, any conclusion that is based on the assumption that all CPE is the same suffers from the same infirmity as the assumption that uniform regulations can be applied to differently situated carriers.

35/ *See City of Brooking Municipal Telephone Co. v. FCC*, 822 F.2d 1153, 1168 (D.C. Cir. 1987) (reversing a Commission order that failed to provide reasons for the agency's decision); *Celcom Communications Corp. v. FCC*, 789 F.2d 67, 71 (D.C. Cir. 1986) ("[T]he agency must consider the relevant evidence presented and offer a satisfactory explanation for its conclusion.").

36/ *See, e.g.*, Bundling of Cellular Customer Premises Equipment and Cellular Service, *Report and Order*, 7 FCC Rcd 4028 (1992) (finding the bundling of cellular and CPE service to be in the public interest); Amendment of the Commission's Rules to Establish New Personal Communications Services, *Memorandum Opinion and Order*, 9 FCC Rcd 4957 (1994) (noting the benefits to consumers and spectrum efficiency of digital technologies); Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, *Second Report and Order and Third Notice of Proposed Rulemaking*, 11 FCC Rcd 9462 (1996) (encouraging seamless mobile service through mandatory roaming); Craig O. McCaw, *Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd 11786, 11795-96 (1995) (discussing benefits of "one-stop shopping" for combined offerings to cellular customers).

and service features that may be compatible with their service usage profiles, rely on CMRS carriers to market or suggest appropriate available services or service features that may fit their needs. The CPNI rules should encourage, not interfere with, this beneficial practice, nor should the rules as applied to CMRS distinguish between customers that have or have not purchased CPE as part of a package from their current carrier.[37]

Typically CMRS carriers analyze CPNI, such as the anniversary date of the customer's contract and the customer's average monthly usage, to identify customers eligible for special service offers. Cellular carriers, including Comcast, also have digital migration programs that use CPNI to identify customers eligible for special offers related to switching to digital service. These types of programs offer eligible customers real benefits without burdening them with the duties of determining and proving program eligibility. To preserve this unique, competitive CMRS culture, the Commission must appropriately implement regulations that comport with reasonable customer expectations.

37/ Further, as several commenters on the CTIA/GTE petitions point out, all but the most sophisticated customers simply do not appreciate the regulatory niceties of what is a regulated service, what is CPE and what is an information service. Indeed, even carriers often have to ask the Commission to resolve these complex questions in a declaratory ruling or other context. GTE, for example, recently filed a tariff proposing widespread deployment of Asymmetrical Digital Subscriber Line capability, a service that proposes to provide high-speed local loop access. *See* GTOC Transmittal No. 1148 filed May 15, 1998. GTE assumes that this service is a telecommunications service, whereas some petitioners have raised the issue that it is an information service. Similarly, AT&T introduced its frame relay service as an unregulated enhanced service, and was forced by the Commission to tariff aspects of the offering as a regulated basic service. *See* Petition for Declaratory Ruling that all IXCs be subject to the Commission's Decision on the IDCMA Petition, *Memorandum Opinion and Order*, 10 FCC Rcd 13717 (1995).

III. CLARIFICATION OF THE CPNI RULES IS REQUIRED TO PREVENT UNNECESSARY PROBLEMS FOR CMRS PROVIDERS

The *Order* did not directly assess the impact of the CPNI rules on common CMRS marketing practices, which has resulted in substantial concern and confusion as the CMRS industry reviewed the scope of the rules and wrestled with obvious dislocations that they would cause. In addition to changing the Commission's CPNI rules as they relate to CMRS CPE and other packaged CMRS services, clarification of the *Order* in other areas is necessary to prevent unintended consequences that will harm consumers and competition.

A. Remarketing Restrictions Harm Consumers

The Commission adopted a rule prohibiting carrier use of CPNI to regain former customers.[38/] It found that the use of CPNI to remarket "is not statutorily permitted" because that use would not be to "initiate" a service and would not be carried out "in [the] provision" of service.[39/] This interpretation of Section 222 is far too narrow and conflicts with CMRS customer expectations.

Customer churn is an important issue for all competitive telecommunications markets, including the CMRS market. Virtually all CMRS providers have customer retention programs. Comcast, for example, operates the "Comcast Rewards" program. In this program, customers that maintain monthly usage at certain levels are rewarded with bonus points that can be aggregated for merchandise or tickets to shows and sporting events. These sorts of programs require carrier tracking of CPNI and are quite popular. Because the use of CPNI in these programs is in the promotion of telecommunications services within the existing customer-

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38/ 47 C.F.R. § 64.2005(b)(3).

39/ *Order* at ¶ 85.

carrier relationship, this use of CPNI is permissible under Section 64.2005(a) of the Commission's rules.

However, the minute a customer informs Comcast that he or she wants to switch service providers, the Commission's view of Section 222 is that the customer-carrier relationship is immediately severed, and Comcast is barred from offering that customer any incentives to stay. Such a result defies common sense and runs counter to common CMRS industry marketing practices.

Many comments filed in response to the CTIA deferral request provided examples of how CPNI is commonly used to offer former or soon-to-be former customers more suitable service packages.[40/] The comments demonstrated that continuation of this practice is contrary neither to Section 222 nor to the public interest where markets are competitive. As Comcast noted, the Commission's failure to permit remarketing creates a situation where a CMRS provider is essentially "cold calling" a former subscriber, a situation which would put any CMRS provider at a distinct disadvantage.[41/] It also has the undesirable effect of encouraging CMRS providers to churn one another's customers, rather than concentrating on the expansion of the CMRS market as a whole, because it will be easier to sell service to a churned customer where the former carrier cannot take effective measures to retain the customer's business.

Comcast urges the Commission to clarify its restriction on CMRS carriers using CPNI to remarket to CMRS customers. It is within the Commission's authority to allow CPNI use for remarketing purposes and carriers should be permitted to use CPNI to retain customers at the

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40/ *See, e.g.*, 360° Comments at 5; Bell Atlantic Mobile Comments at Exhibit 3; United States Cellular Corporation Comments at 4.

41/ Comcast Reply at 9 n.15.

very least until the customer is no longer a customer. Consequently, on reconsideration, the Commission should clarify that CMRS providers can use CPNI to retain or regain a customer.

The Commission also should clarify its definition of CPNI to exclude employee knowledge of a specific customer. A problem with the rule as currently framed is that it requires CMRS employees (and potentially agents) not to know information they inherently know from working for a CMRS provider: the identity of large clients and the attributes of these significant accounts. Without accessing customer CPNI, many account representatives have a significant amount of institutional knowledge gained from, in some cases, years of working on the same customer account. This institutional knowledge does not disappear if a customer leaves. Consequently, attempting to remarket to a large former account could be deemed restricted use of CPNI even when no CPNI was used. CMRS account representatives should not be found to have violated the Commission's rules if they remarket former accounts on this basis. On reconsideration, the Commission should make plain that the definition of CPNI does not encompass the generalized information naturally gained by account representatives or agents during the course of their employment.

The Commission also should clarify the meaning of language in Section 64.2005(b)(3) addressing the circumstances where a customer has "switched to another service provider." Because the Commission has determined that there are three specific telecommunications service categories, the rule needs to address whether switching is meant to be applicable only within a service category, such as when a customer switches between CMRS providers, or whether is it meant to include situations such as switching from a landline LEC to a CMRS provider. If the rule is to apply at all, it should apply to all customer-carrier changes, including customers that switch from landline to wireless service.

B. Fraud Prevention Programs Should Be Permitted to Use CPNI

Given the CMRS industry's need to prevent fraudulent calling, there is relatively constant monitoring of network usage to detect unusual calling patterns. While carriers attempt to review data promptly, there could be instances where customer CPNI is being reviewed for possible fraud after a customer has terminated service. On reconsideration, therefore, the Commission should clarify in its rules that CPNI information gathered as part of a fraud prevention program can be used by carriers. While Section 222 itself appears to cover this circumstance, it would be helpful to have a Commission rule to this effect.

IV. THE "TOTAL SERVICE" APPROACH CREATES UNIQUE COMPETITIVE ADVANTAGES FOR ILECs OPERATING IN NON-COMPETITIVE MARKETS

The Commission chose a "total service" approach to CPNI regulation as a compromise among several alternatives. The first approach was a "simple category" approach, which would have permitted broad information sharing. The Commission rejected this approach, fearing that it would make CPNI regulation and Section 222 meaningless.[42] Another approach, the "discrete offering" approach, the Commission rejected because it was considered too narrow to promote competition among industry participants.[43] The "total service" approach reflects a compromise between these extremes.

42/ Order at ¶ 33. Under the single category approach, CPNI derived from a carrier's provision of any telecommunications service could be used to market any other telecommunications service offered by the carrier or its affiliates.

43/ Under the discrete offering approach, CPNI derived from a discrete offering may be used only with respect to that discrete regulated offering or feature of service.

A. The "Total Service" Approach Is Ill-Suited for Application Between Competitive and Non-Competitive Markets

The "total service" approach allows carriers to share CPNI for marketing purposes across all regulated offerings and service categories subscribed to by a customer from a carrier and its affiliates.[44] The Commission describes the "total service" approach as flexible and subject to expansion with developing technologies.[45] However, even if a "total service" analysis is desirable in defining the scope of elements included in common CMRS services rendered to customers, it still is ill-suited for application between competitive and non-competitive markets.

Commissioner Ness, in her partial dissent to the *Order*, presents two compelling examples of how the total service approach will favor incumbent LECs:[46]

> If MCI, AT&T, or any one of a hundred other long distance companies successfully wins the interLATA business of a customer, it does not automatically acquire the right and the opportunity to access the customer's *local* service information. Yet, under the approach adopted by the majority today, if the structurally separated affiliate of a Bell operating company wins the interLATA business of a customer, it *does* automatically acquire the right and the opportunity to access the customer's local service information. I don't think this discrepancy is what Congress intended.
>
> Consider another example. Under Section 272(g)(1), the structurally separate affiliate may market the local service offerings of its affiliated operating company, provided that other entities may also do so. So, if a Bell operating

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44/ Under the "total service" approach, carriers may share CPNI among all regulated telecommunications offerings subscribed to by a customer. *Order* at ¶ 30.

45/ *Id.* at ¶ 58. Comcast takes issue with this view for a number of reasons but most significantly because the "total service" approach as currently defined by the Commission is out of step with existing technological realities with respect to CMRS transmission and CMRS CPE.

46/ While these examples are not CMRS specific, the potential harm to CMRS providers exceeds that which interexchange carriers would suffer because many CMRS carriers provide niche services or CMRS-only services and do not have multiple telecommunications affiliates with CPNI that they can freely access. In other words, the rules discriminate in favor of multi-service providers by permitting not just bundling of separate services but also CPNI sharing among separate services and among "affiliates" (a term that could encompass a myriad of business relationships about which customers may be completely ignorant).